QUEEN'S BENCH.
APPEAL SIDE.

W. VONDENVELDEN,

APPELLANT;

vs.

DENNIS BRADY,

RESPONDENT.

APPELLANT'S CASE.

QUEEN'S BENCH.

APPEAL SIDE.

Province of Canada, LOWER CANADA.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

WILLIAM VONDENVELDEN,
(Defendant in the Court below,)
APPELLANT,

DENNIS BRADY,
Plaintiff in the Court below,
RESPONDENT.

THIS APPEAL is from a Judgment rendered on the Twentieth of January last, in the Superior Court of the District of Saint Francis, confirming a Judgment rendered on the 14th of November last, in the Circuit Court of Richmond.

The action was Petitoire against the Appellant as a squatter or North-west half of Lot No. 5 in 5th Range of the Township of Kingsey. The declaration, instead of alledging that the half Lot was granted according to admeasurement more or less, according to the Patent, substituted *tenans et aboutissans* Joseph Francœur, especially on Lot No. 6.

The plea was this. Lots No. 5 and 6 are contiguous; the Defendant is not on Lot No. 5, but on Lot No. 6, of which he is proprietor. If, however, he is on any part of lot No. 5, let a line be run and then if he is on any part of Lot No. 5 he will deliver it up, on payment of Improvements, he admitting the right of the Plaintiff to Lot No. 5. If this plea was true, the allegation of tortious possession was untrue, and no Jurisdiction could exist in the Circuit Court to rectify rights between contiguous proprietors. The proof of the Respondent was insufficient, and that of Appellant destroyed the allegation of tortious possession.

In May last Judgment was given against the ~~Plaintiff~~ Defendant, who procured its reversal on the 9th of June last, by an interlocutory ordering that *avant faire droit* the *tenans et aboutissans* of the declaration should be verified. Surveyors were named who set the interlocutory aside, and merely placed geometrical bounds on a reduction, which they were not authorized to make, and which had nothing common with the issue in the cause. This verification was the property of Appellant, which no power but a superior Appellate Jurisdiction could take away without manifest injustice.

Even if that reduction was legal in the cause it was defective, because—

1st.—The Mill Brook, recognized as the bone of contention, is marked in the Field Book referred to by the surveyors, as being altogether on Lot No. 6, in a straight North-east direction, at two chains distance from Lot No. 5, between the 4th and 5th Ranges, and at 11 chains from Lot No. 5, between 5th and 6th Ranges, and there lies the Brook as the best of land marks. To displace this Brook, as the surveyors have done, required the gravest reasons and minutest explanations; but the surveyors did not do so, and could not do so, because had the exploration taken place between town line and town line, the position of the Brook would have proved correct.

2nd.—The Report, closely observed, is seen to acknowledge the Appellant as adjacent possessor on Lot No. 6, instead of Joseph Francœur.

3rd.—The pretended original corner of a birch stump on Lot No. 5 is a fabrication when compared with the Field Book that does not mention it, and its falsity nullifies the whole.

4th.—The surveyors could not assume that a Post 27 years old was an original one when unsupported by the Field Book.

The Judgment homologates it and at the same time violates it by not adopting its metes and bounds, and taking virtually the old *tenans et aboutissant* of the Declaration, declared in appeal to be uncertain, although the *tenans* of the report and those of the Declaration cannot be the same, at least on the side of Lot No. 6 and now part of No. 6 must be given with lot No. 5. The Appellant had asked for his impenses according to law at *dire d'Experts*, this at least, could not be refused lawfully, and it was refused.

If the integrity of the Field Book is to be maintained, the Appellant on his Mill Brook stands in

the middle of Lot No. 6, at eleven chains from No. 5 itself, a swamp, but if it is to be altered by the Reduction of 24 Lots, this certainly could not be done in an exceptional Jurisdiction against squatters without a chance to plead to the point by a regular issue and proof thereon.

Finally, the Respondent connived at the violation of the interlocutory on pretence of a statute of 1849. In this case the Respondent ought to have appealed from the Interlocutory instead of accepting it. Right or wrong the Interlocutory should have been executed, even if only *pro forma*, when not appealed from; but it was thrown aside by the surveyors, the inferior Judge and the Respondent acting together. If the Respondent has foreclosed himself by his unfair proceedings, the Appellant is entitled to a dismissal for want of proof, and want of verification of bounds, according to Declaration and Letters Patent.

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For Appellant.

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